No. 83-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALABAMA POWER CO., *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS ALABAMA POWER CO., *ET AL.*

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ARGUMENT

In this case, Federal Respondent agrees with Petitioners that the lower court erred in substituting its judgment on complex, technical issues for that of the Environmental Protection Agency (EPA or Agency).[1] Nevertheless, both Federal Respondent and Respondents Sierra Club, *et al.* (hereinafter Sierra Club) oppose cer-

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[1] *See* Brief of Federal Respondent 8. Indeed, there apparently was serious discussion within the government as to whether to seek certiorari in this case, leading the government to request an extension of time "to file certiorari to consider those recommendations [of interested government agencies concerning certiorari], to determine whether to seek certiorari, and, if we decide to do so, to prepare and print a petition." Application for An Extension of Time in Which to File a Petition For a Writ of Certiorari on Behalf of EPA 3 (March 1984).

tiorari. For the reasons discussed below, respondents' arguments in opposition to certiorari are without merit.

I. CERTIORARI SHOULD BE GRANTED TO ESTABLISH THE STANDARD OF REVIEW APPLICABLE TO AGENCY INTERPRETATIONS OF LAW

Under the Clean Air Act,[2] the D.C. Circuit has exclusive jurisdiction to review EPA actions of national scope and effect. CAA § 307(b)(1). Such actions include EPA rules, such as those promulgated by EPA under § 123 of the Act, which govern the requirements states must include in their implementation plans mandated by § 110 of the Act. Once the D.C. Circuit has spoken, no court, save this Court on review of a D.C. Circuit opinion, can consider the correctness of the D.C. Circuit's pronouncement on the validity of such rules.[3]

In this setting, the standard of review that the D.C. Circuit will apply must be known in order to enable rulemaking participants to identify the issues that can legitimately be presented on appeal. If judicial review rights of those affected by EPA's rules are to be forever foreclosed after expiration of the 60-day review period under § 307(b) of the Act, fundamental fairness dictates that affected parties know the ground rules that will be applied in determining the validity of EPA's actions.

Contrary to Sierra Club's assertions, Sierra Club Brief 9-10, 12, the ground rules governing judicial review of agency interpretations of law are not fixed in the D.C. Circuit and were not properly applied by the court below. In each case that comes before the court, the D.C. Cir-

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[2] The Clean Air Act, 42 U.S.C. § 7401, *et seq.* (Supp. V 1981) (hereinafter referred to as "CAA" or "the Act"). (For convenience, all further citations will be to the Act. Parallel citations to the U.S. Code are given in the Table of Authorities.)

[3] Clean Air Act § 307(b)(1), (2); *see* Adamo Wrecking Co. v. United States, 436 U.S. 275, 289 (1978) (Powell, J., concurring); Union Electric Co. v. EPA, 427 U.S. 246, 270-71 (1976) (Powell, J., concurring).

cuit chooses between a "deference" standard and a "*de novo* review" standard in judging agency interpretations of statutory terms. Petition for Certiorari of Alabama Power Co., *et al.* 16-17 (hereinafter "Pet."). For example, while the lower court sustained Sierra Club's challenge to EPA's interpretation of the technical statutory term "good engineering practice" (GEP) in this case, in another recent case, *Motor Vehicle Manufacturers Ass'n v. Ruckelshaus*, 719 F.2d 1159 (D.C. Cir. 1983), the lower court rejected an industry challenge and deferred to EPA's similar interpretation of GEP under another provision of the Act.

In the instant case, EPA interpreted GEP to refer to what engineers had done in the past. While this interpretation of GEP found support in the plain meaning of the statute and its legislative history, it was nevertheless rejected by the court.[4] By contrast, in the other recent decision, the D.C. Circuit rejected a challenge by industrial petitioners to EPA's interpretation of "good engineering practices" under § 207(b) of the Act. In affirming EPA's interpretation in that case, the court found that it was properly based upon "real world" experience and "the reasonable capability of personnel and equipment"—i.e., actual engineering practice.[5] According to the lower court, the "Administrator's resolution of thorny technical problems [in defining "GEP"] . . . represents a reasonable accommodation of conflicting interests entrusted to his care. In this respect . . . 'a reviewing court must be at its most deferential.'"[6] In sum, faced with consistent Agency interpretations of virtually identical statutory language, the D.C. Circuit applied differ-

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[4] *See* Pet. 20-22; Sierra Club v. EPA, 719 F.2d 436, 457 (D.C. Cir. 1983), Appendix to Petition for Certiorari at 42a-43a (hereinafter "App.").

[5] *See Motor Vehicle Manufacturers Ass'n*, 719 F.2d at 1167; 45 Fed. Reg. 34802, 34812 (1980).

[6] *Motor Vehicle Manufacturers Ass'n*, 719 F.2d at 1167 (citation omitted).

ent standards of review to produce dramatically different results.

While Federal Respondent, like Petitioners, disagrees with the lower court's substitution of its interpretation of technical terms such as "GEP" and "excessive concentrations" for that of EPA,[7] Federal Respondent nonetheless states that the lower court's "rejection of EPA's interpretation stemmed *not* from its failure to accord the proper degree of deference, but from its conclusion that the legislative history and objectives of Section 123 compelled a different outcome." Brief of Federal Respondent 8. This statement makes little sense, in light of the government's assertion that "the court of appeals could have (*and should have*) accepted EPA's definition of key technical terms in Section 123." *Id.* (emphasis added). If the lower court's independent consideration of ambiguous legislative history and statutory objectives, in the face of admittedly reasonable Agency conclusions, does not constitute a failure to give deference (as the government suggests), this Court should take this opportunity to clar-

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[7] Federal Respondent argues that the lower court's holdings on "GEP stack height credit" and "excessive concentrations" are "questionable, because the statute itself and other legislative history lend support to EPA's reliance on traditional engineering practice." Furthermore, Federal Respondent argues, as does Petitioner, that "Section 123 itself arguably adopts the traditional 'two and a half times' formula as a good estimate of the GEP height, and the House Report 'affirms' that formula." Brief of Federal Respondent 10 & n.10.

Curiously, Sierra Club suggests that Congress rejected earlier EPA guidelines in the 1977 Amendments to the Clean Air Act. *See* Brief of Sierra Club 3. This statement is seriously misleading. As the lower court recognized, Congress adopted in 1977 the essence of EPA's earlier definition of "GEP." *See* Sierra Club v. EPA, 719 F.2d at 441, App. 8a. Congress only rejected that portion of EPA's earlier guidance that exempted sources from this GEP rule if they used "best available control technology" or if continuous controls were infeasible. *Id.* These aspects of the earlier guidance were not relied upon by EPA in the § 123 rulemaking and are not at issue in this case.

ify its prior holdings that appellate courts must accept "reasonable" interpretations of the Clean Air Act.[8]

Given the confusion demonstrated by Federal Respondent as to the appropriate standard of judicial review and given the number of recent D.C. Circuit cases involving EPA and other agency interpretations of law which have required review by this Court,[9] review of this case is

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[8] *See Union Electric Co.*, 427 U.S. at 256; Train v. NRDC, 421 U.S. 60, 75 (1975).

[9] The D.C. Circuit's shifting standard of review has led this Court to review and to reverse the D.C. Circuit in numerous cases over the past few years where the degree of deference to an agency's interpretation was in dispute. *See* Morrison-Knudsen Construction Co. v. Director, OWCP, 103 S.Ct. 2045 (1983) (OWCP interpretation of the term "wages" under the Longshoreman and Harbor Workers' Compensation Act); FEC v. National Right to Work Committee, 459 U.S. 197 (1982) (FEC interpretation of the term "member" of a corporation under the Federal Election Campaign Act (FECA)); FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981) (FEC interpretation of FECA language concerning agency relationships); FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (FCC implementation of the term "public interest" under the Communications Act); Board of Governors of the Federal Reserve System v. Investment Company Institute, 450 U.S. 46 (1981) (Federal Reserve Board definition of "closely related to banking" under the Bank Holding Company Act); Andrus v. Sierra Club, 442 U.S. 347 (1979) (CEQ interpretation of NEPA language); NLRB v. Local Union No. 103, Int'l Ass'n of Iron Workers, 434 U.S. 335 (1978) (NLRB interpretation of term "unfair labor practice" under the NLRA). *See also* Chevron U.S.A. Inc. v. NRDC, *cert. granted*, 103 S.Ct. 2427 (May 31, 1983) (No. 82-1005 and consolidated cases) (certiorari granted to review D.C. Circuit's rejection of EPA interpretation of the term "source" under the nonattainment provisions of the Clean Air Act.).

Sierra Club argues that this Court's denial of petitions for certiorari in the mid-1970s in cases dealing with the use of "dispersion techniques" under the 1970 Clean Air Act should lead it to deny certiorari here. *See* Brief of Sierra Club 9. To the contrary, the courts in those cases *deferred to EPA's implementation of* the Clean Air Act's restrictions on the use of dispersion techniques, rejecting challenges to EPA's interpretation of the Act. *See* Big Rivers Electric Corp. v. EPA, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); Kennecott Copper Corp. v. Train,

necessary to give the lower court and those that must appear before the D.C. Circuit much needed guidance on the scope of its review powers. As in *Vermont Yankee v. NRDC*, 435 U.S. 519 (1978) (where the Department of Justice also opposed certiorari), this case provides an appropriate opportunity for this Court to speak out on an important question of administrative law. Through this case, the Court can establish a controlling precedent that will put an end to the D.C. Circuit's *ad hoc* approach to determining what standard it will use to review agency interpretations of law under the Clean Air Act and similar statutes.

II. CERTIORARI IS NECESSARY TO ESTABLISH THAT EPA, IN THE FACE OF CONGRESSIONAL SILENCE, MAY ADOPT RULES THAT AVOID ABSURD RESULTS

Federal Respondent, like Petitioners, disagrees with the lower court's decision on plume impaction and contends that "EPA should have been allowed to fill the gap created by Congress." Brief of Federal Respondent 9. Sierra Club, by contrast, argues that "[t]he absence of a [specific] plume impaction exemption in § 123 must . . . be interpreted as a deliberate congressional choice to deny such treatment here." Brief of Sierra Club 13. The lower court's decision therefore presents a major issue of administrative law, involving the authority of a federal agency to interpret its enabling statute in a manner which avoids absurd results that were clearly never con-

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526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *see also* 44 U.S.L.W. 3449 (Feb. 2, 1976); 44 U.S.L.W. 3374 (Dec. 23, 1975); *cf.* NRDC v. EPA, 529 F.2d 755, 760 (5th Cir. 1976) (court of appeals approved EPA's 2.5 times source height GEP rule in the face of NRDC's challenge). Those cases therefore provide no support for denial of certiorari here since, in this case, the court of appeals refused to defer to EPA's interpretation of the Act, requiring a redirection of the § 110 state air programs. Whenever asked to review a case rejecting EPA's construction of the Act and requiring such redirection, this Court has granted the petition. *See* Pet. 2-3.

templated by Congress in enacting the provision.[10] Certiorari is needed to establish that, contrary to Sierra Club's contention, congressional silence on "plume impaction" should not be construed "as a deliberate congressional choice to deny such treatment" in these rules. Brief of Sierra Club 13; *see* Pet. 22-26.

III. THE POTENTIAL SOCIAL AND ECONOMIC IMPACTS OF THE D.C. CIRCUIT'S DECISION CALL FOR REVIEW BY THIS COURT

Federal Respondent does not dispute the potentially serious social and economic impacts that could result from the D.C. Circuit's decision. To the contrary, the Solicitor General's motion for enlargement of time to consider EPA's recommendation on certiorari, *see supra* note 1, and recent EPA statements concerning interim implementation of § 123 [11] reflect the seriousness of the lower

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[10] Pet. 22-26. As Appendix A to this brief (hereinafter "Br. App. A") shows, over 40 states have very high terrain features within their borders. To suggest, as the lower court did, that Congress was "indifferent" to "harsh" discrimination against economic development in rugged terrain areas is to impute a fundamentally irrational intent on the part of the vast majority in Congress. Such an interpretation would be inconsistent with the law of this Court. *See* Pet. 25 & n.55.

[11] EPA explains in an interim policy statement issued in May 1984 that, since the lower court has set aside significant portions of the final § 123 rules,

> [the Agency will try] to avoid actions that may need to be retracted later . . . [including action on] specific emission limitations . . . and requests to redesignate areas to attainment . . . .

[Current Developments] ENV'T REP. (BNA) 85 (May 18, 1984). Moreover, EPA states that actions already taken will have to be reviewed and may require revision as a result of any remand proceeding. *Id.*

The need to conduct numerous, time-consuming individual plant reviews and to reassess area classifications are the types of serious impacts that led Federal Respondent to seek certiorari in a recent case involving the nonattainment provisions of the Clean Air Act. *See* Petition for Certiorari of EPA at 23-24, EPA v. NRDC (No.82-1591) (consolidated with Chevron U.S.A. Inc. v. NRDC (No. 82-1005)). Moreover, while that case could have required action in

court's decision to the administration of the Act. Sierra Club, on the other hand, attempts to discount the potential impacts of the lower court's decision. Sierra Club thus observes that "[*t*]*he few facilities* with stacks above 65 meters consist almost exclusively of *148 power plants* and four copper smelters." Brief of Sierra Club 6-7 (emphasis added).

The "minimal impact" assertions of Sierra Club do not withstand analysis. The 148 power plants referred to by Sierra Club constitute 28% of the fossil fuel-fired electric generation capacity in this nation, serving potentially more than 70 million customers. These plants are located in 41 states, *see* Br. App. B; many of them are located in areas of rugged terrain that will be especially severely affected by the lower court's decision, *see* Br. App. A; and still others are located in industrial areas where false stack height assumptions will affect neighboring sources and industrial growth. *See* Pet. 27. Finally, the lower court's mandate will affect future economic development in any area where a new power plant or other major industrial facility attempts to locate.[12]

The contention of Sierra Club that this case is of little practical consequence is also belied by their own statements in the administrative proceedings in this case. At an EPA public hearing held on December 19, 1983 to discuss the implications of the lower court's decision, for example, a representative of respondent NRDC testified that "[i]n remanding [the GEP rule], the court asked

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potentially 31 states, this case could require implementation plan revisions in at least 41 states. *See* Appendix B to this brief (hereinafter "Br. App. B"). It is thus understandable that Federal Respondent has not disputed the practical significance of this case.

[12] Pet. 27 n.59 & accompanying text. The potentially serious, adverse impacts of the lower court's decision on other industries are discussed in the briefs that have been filed before this Court by representatives of the smelter industry, the coal industry, the paper industry, and others. It should be noted that Sierra Club refused to consent to the filing of briefs explaining the potential effects of the lower court's decision on other industries.

EPA to consider whether the use of the formula could *ever* be justified." Transcript of Public Hearing Regarding GEP Stack Height Regulations 34 (emphasis added). Further, NRDC testified that abandonment of the GEP formula could require case-by-case examination of "429 stacks over the *de minimis* height." *Id.* at 34-35.

Finally, Federal Respondent suggests that, with respect to the GEP formula, the lower court has "left the EPA considerable discretion in implementing the court's mandate" on remand. Brief of Federal Respondent 12. In light of the errors in the lower court's decision, the potentially significant impacts that could flow from these errors, and the position of NRDC before EPA that the Agency has *no* flexibility on remand under the lower court's decision, this general statement is not reassuring. At most, it holds open the promise of further litigation in the D.C. Circuit, creating further uncertainty for the states and regulated industries.

In sum, review by this Court is justified by the practical importance of this case and the need to settle the law governing this important aspect of the § 110 state-federal air quality programs.

CONCLUSION

For the reasons discussed in the Petition for Certiorari and those additional reasons presented above, this Court should grant certiorari and reverse the decision of the D.C. Circuit. Further, as described in the accompanying Motion to Defer Decision on this Petition, another Clean Air Act case that is currently before this Court for decision raises standard of review issues of a nature similar to those presented in this case. *See Chevron U.S.A. Inc. v. NRDC* (No. 82-1005 and consolidated cases). Since resolution of that case may have a direct bearing on the Court's decision on this Petition for Certiorari, Petitioners respectfully request that action on this

petition be withheld pending a decision by this Court in *Chevron U.S.A. Inc. v. NRDC*, and the filing of a supplemental brief by Petitioners on the significance of that decision.

Respectfully submitted,

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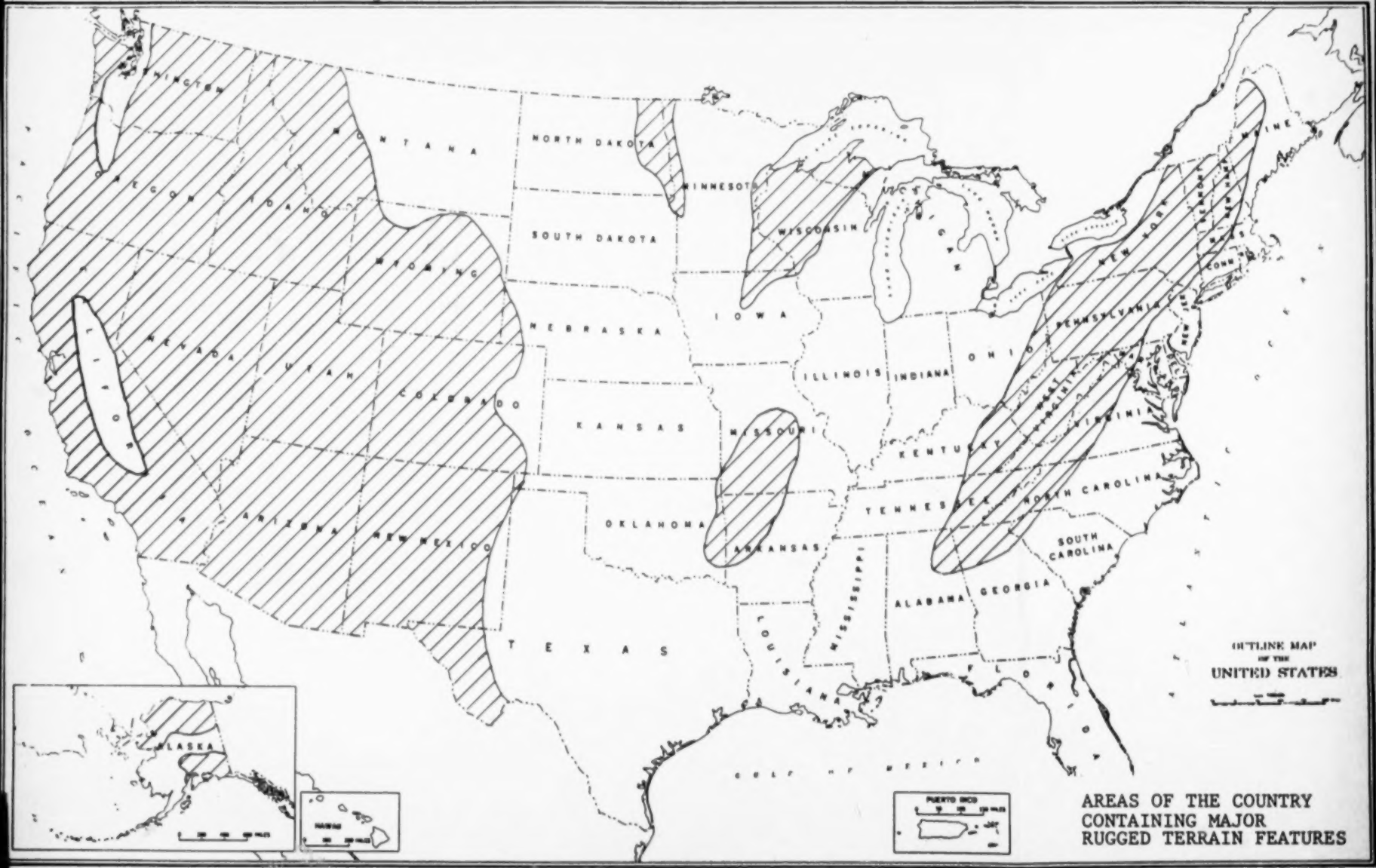
June 7, 1984

APPENDICES

APPENDIX A


WASHINGTON
OREGON
IDAHO
MONTANA
NORTH DAKOTA
MINNESOTA
SOUTH DAKOTA
WISCONSIN
MICHIGAN
WYOMING
NEBRASKA
IOWA
NEVADA
UTAH
COLORADO
ILLINOIS
INDIANA
OHIO
PENNSYLVANIA
NEW YORK
MAINE
VERMONT
NEW HAMPSHIRE
MASSACHUSETTS
CONN.
KANSAS
MISSOURI
KENTUCKY
VIRGINIA
ARIZONA
NEW MEXICO
OKLAHOMA
ARKANSAS
TENNESSEE
NORTH CAROLINA
SOUTH CAROLINA
MISSISSIPPI
ALABAMA
GEORGIA
LOUISIANA
FLORIDA
TEXAS
GULF OF MEXICO
ALASKA
HAWAII
PUERTO RICO
OUTLINE MAP OF THE UNITED STATES
AREAS OF THE COUNTRY CONTAINING MAJOR RUGGED TERRAIN FEATURES


OUTLINE MAP
OF THE
UNITED STATES
LOCATION OF FOSSIL-FUELED POWER PLANTS POTENTIALLY AFFECTED BY COURT ORDER
SOURCE: EPA IMPACT ASSESSMENT REPORT FOR THE STACK HEIGHTS REGULATIONS, APPENDIX B
(April 1981)
ALASKA
HAWAII
PUERTO RICO
WASHINGTON
OREGON
IDAHO
MONTANA
NORTH DAKOTA
MINNESOTA
SOUTH DAKOTA
WISCONSIN
WYOMING
NEBRASKA
IOWA
NEVADA
UTAH
COLORADO
KANSAS
MISSOURI
ILLINOIS
INDIANA
OHIO
KENTUCKY
WEST VIRGINIA
VIRGINIA
PENNSYLVANIA
NEW YORK
MAINE
VERMONT
NEW HAMPSHIRE
MASS
CONN
ARIZONA
NEW MEXICO
OKLAHOMA
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NORTH CAROLINA
SOUTH CAROLINA
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